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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION No. 490 OF 2006

Dirk India Private Limited)
a Company incorporated under the)
provisions of the Companies Act)
1956 having its registered office
at Plot No. 10, India House,)
Geetanjali Colony, Indira Nagar)
Mumbai Agra Road, Nashik 422 009) ..Petitioner

Vs.

Mahagenco, a company trifurcated
from earstwhile Maharashtra)
State Electricity Board and)
incorporated under the provisions
of the Companies Act, 1956 having
its registered office at)
"Prakashgadh" Bandra,)
Mumbai 400 051.) Respondent

Mr. Rafique Dada, Sr. Advocate with Mr. Janak Dwarkadas, Sr. Advocate with Mr. Zuber Dada and Mr. M. Tally i/b S. Mahomedbhai & Co. for the petitioner.

Mr. S.J. Amey, Sr. Advocate with Mr. Shriram S. Kulkarni, Advocates for the respondent.

CORAM : D. G. KARNIK, J.

DATE : MARCH 8, 2007.

ORAL JUDGMENT

. The respondent has constructed a thermal electric power generation plant, (for

short "The power plant") at Eklahare, Nashik . Coal is used for firing boilers. Ash generated by burning of coal, known as fly ash released in the air is a potential health hazard. At one point of time, fly ash was regarded merely as an industrial waste, requiring proper care and attention for its disposal. On 14th September 1999, a notification was issued by the Government of India in the Ministry of Environment and Forest interalia setting out guide-lines for the disposal of the fly ash. Fly ash, which at one time was merely an industrial waste, appears to have become saleable bye produce on account of new technology alleged to be developed by the petitioner. Fly ash is used as a raw material for the production of a substance called "Pozzocrete" used for surfacing roads which reduces use of cement concrete and strengthens and increase life of roads.

2. On 4th October 2002 an agreement was executed between the petitioner and the Maharashtra State Electricity Board, the predecessor in title of the respondent, under

which the respondent agreed to supply to the petitioner the Pulvarized Fly Ash (hereinafter referred to as the "PFA") on the terms and conditions mentioned therein. Under the agreement, the petitioner was to construct a plant for the manufacturing of Pozocrete on a portion of the land, to be leased to it by the respondent, on the site of power plant. The PFA generated was to be supplied by the respondent to the petitioner for manufacture of Pozocrete. Under Clause 3.1 of the agreement, the petitioner was to erect four "Hoppers" for the collection of PFA within the precincts of the power plant. Under Clause 3.2 the respondent was to deliver the PFA to the petitioner by depositing the same into said four Hoppers, to be constructed by the petitioner. The petitioner had agreed to receive and take a minimum quantity of 1000 metric Tonnes of PFA per day for the initial period of 12 months and had agreed to take minimum quantity of 3000 Metric Tonnes per day during the remaining period of 29 years. The agreement for the supply was valid for 30 years. The respondent agreed to grant on lease

to the petitioner suitable site for erection of Pozocrete plant and also for construction of four Hoppers and other incidental use.

3. The land offered by the respondent to the petitioner in terms of the agreement for the construction of Pozocretes plant was discovered to be forest land within the meaning of Forest Conservation Act 1980. On account of it, there was a delay in the construction of the Pozocrete plant and petitioner was able to erect only one out of four Hoppers, promised by it. Disputes arose between the parties, on this count. According to the petitioner, the respondent had agreed to deliver the PFA at the Hoppers and the responsibility of the delivery i.e. to say, carrying of the PFA from the power plant to the Hoppers was that of the respondent, while according to the respondent PFA was required to be delivered not at the site of the Hoppers but the petitioner required to collect the PFA from the Power Plant to the Hoppers. There were also disputes between the parties relating to the cost of construction of the conveyer system for carrying the PFA. More

serious dispute arose between the parties on account of claim of the respondent that petitioner was not lifting the entire amount of PFA generated at the Power Plant. The PFA generated if not collected immediately, would cause health hazard and environmental problems. According to the respondent, it may be required to close down of the power plant, if the PFA was accumulated and escaped in the air. The respondent alleged that the petitioner was committing breach of the agreement and exposing it to the threat of action by the Pollution Board on account of non collection of the PFA generated. According to the respondent, in order to protect it from any action at the hands of environmental protection authorities in future, it was therefore required to sell a part of the PFA to outside contractors.

4. Several meetings were held between the parties to resolve the disputes. In particular, in the high level meeting held on 11th April 2005, some disputes were resorted. The petitioner agreed that it would not insist on the lease of the land, if the respondent

conferred on the petitioner exclusive right for entire PFA generated over and above the contracted quantity of 3000 Metric Tones per day. The petitioner also agreed to errect the remaining three Hoppers (called as "Silos"), without any delay. It however, appears that no agreement could be reached about the construction of the Conveyer system, as it involved expenditure of Rs. five Crores.

5. Even after the meeting dated 11th April 2005 the disputes persisted between the parties. Each party making allegation on the other of the breach. Finally, by a notice dated 23rd November 2006, the respondent terminated the agreement dated 4th October 2000 with the petitioner. According to the petitioner, the action of the respondent purporting to terminate the contract is unwarranted, illegal and contrary to the contract. The petitioner, therefore invoked the arbitration clause and has filed a petition under S. 11 of the Arbitration Act, which is pending before the Hon. the Chief Justice for appointment of an Arbitral Tribunal. Pending

the appointment of Arbitral Tribunal and its decision, the petitioner has filed this petition under S. 9 of the Arbitration Act for interim reliefs, includeing-

i) an order restraining the respondent from giving effect to the termination notice dated 23rd November 2006.

ii) an order restraining respondent from in any manner hampering or obstructing the petitioner in collection of the PFA at the respondent's power plant.

iii) a mandatory order directing the respondent to deliver to the petitioner, the contracted quantity of PFA from time to time at their Hopper (Silo).

iv) an injunction restraining respondent from supplying to any third party other than petitioner any quantity

of the PFA generated on its power plant.

v) an order of injunction restraining respondent from dispossessing the petitioner from its PFA processing plant and the machinery installed by it, in pursuance of the agreement.

vi) an order restraining the respondent from cutting of the water supply or electric connection to the petitioner's PFA producing pland and laboratories.

(vii) other incidental reliefs.

6. Learned counsel for the petitioner as well as respondent, initially addressed me on the question as to who committed breach of the contract dated 4th October 2000. Counsel took me to the various provisions in the contract each interpreting its provisions in his own way. Counsel for the petitioner, referring to the condition of the contract submitted that

the respondent had clearly committed breach of the contract. He also invited my attention to certain documents which according to him proved the breach on the part of the respondent. On the other hand, counsel for the respondent also referred some conditions of the contract and submitted that petitioner had committed their breach. He also invited my attention to some other documents, which according to him, showed that the petitioner had committed the breach. In my view, the question as to who has committed breach of the contract would be required to be decided by the Arbitral Tribunal. On the basis of the affidavits filed before me, it is neither possible nor appropriate to ascertain even prima facie, as to who has committed breach of the contract. That question is best left to be decided by the Arbitral Tribunal.

7. Mr. Dada learned senior counsel for the petitioner submitted that from the facts on record, it is clearly established that the respondent had agreed to supply to the petitioner the PFA generated at the

respondent's Thermal Power Plant. In the first year, the petitioner had agreed to lift minimum 1000 M. Tones of the PFA and for remaining 29 years, it is agreed to lift 3000 M. Tones of PFA per day. The PFA was to be supplied free of costs and the petitioner was only to pay consideration at the rate of Rs.30/- per M. Tones of Prozocrete actually manufactured. There was no default on the part of the petitioner in payment. The petitioner is always and was willing to perform his part of contract. The alleged default namely alleged non lifting of the entire PFA, the alleged default in non erecting of the remaining 3 Hoppers (Silos), are the points of disputes, which were referable to the Arbitration. The respondent itself made it impossible to the petitioner to erect remaining 3 Hoppers (Silos) by not giving non-forest land and refusing to deliver the PFA at the one Hopper (Silo) contracted but requiring the petitioner to transport it from power plant to the Hopper site. Counsel for the petitioner also submitted that under Clause 3.3 of the agreement, the respondent could sale or to

dispose of the PFA only over and above the quantities of 1000 M. Tones and over and above 3000 M. Tones of PFA in the first year for the remaining period of 29 years. There was not only a positive agreement between the parties that the respondent would supply to the petitioner 1000 or 3000 M. Tones, as the case may be, of PFA, but there was implied negative covenant that respondent would not supply the PFA to anybody else, until 1000 / 3000 M. Tones of PFA was supplied to the petitioner. Learned counsel for the petitioner submitted that petitioner was therefore, entitled to two of injunctive reliefs ; firstly a positive mandatory injunction, directing the respondent to supply 3000 M. Tones of PFA to the petitioner per day; and negative injunction restraining respondent from supplying any quantity of PFA to anybody else, untill 3000 M. Tones of PFA per day was first supplied to it. Learned counsel further submitted that mandatory injunction could not be granted, a negative inunction restraining sale to a third party could be granted under section 42 of the Specific Relief Act, 1963.

8. In order to support his submissions, Mr. Dada referred to and relied upon the following decisions :

(i) **Sky Petroleum Ltd. Vs. VIP Petroleum Ltd. [1974] 1 All ER,954.**

(ii) Posner and Others Vs. Scott-Lewis and Others, [(1986) 3 All ER 514]

(iii) Gujrat Bottling Co. Ltd. Vs. Coca Cola Co. [(1995) 5 SCC 545];

(iv) Pioneer Publicity Corporation Vs. Delhi Transport Corporation & Anr. [2003(1) Arbitration Law Reporter, 672];

(v) Vijaya Minerals Pvt. Ltd. Vs. Bikash Chandra Deb [AIR 1996 Calcutta 67];

(vi) **National Shipping Corporation of**

Soudi Arebia Vs. Central Industries Ltd., [AIR 2004 Bombay 136].

9. Mr. Amey, learned senior counsel for the respondent, submitted that the contract admittedly was in respect of supply of PFA, which is a movable property of not any special value, nor an extra ordinary article of commerce and therefore, no specific performance of the contract for sale or delivery of such movable property could be granted. Specific performance of such contract could not be granted in view of Explanation (ii) to Section 10 of the Specific Relief Act, 1963. He further submitted that in any event, the contract for supply of PFA generated was not purely a contract of supply but involved performance of several minute and variety of acts of numerous detail/s, and since it would not be possible for the Court to supervise performance of the contract in all its details, the contract would not be specifically enforced in view of sub-clause (b) of Sub-Section 14 of the Specific Relief Act. He further submitted that there was no negative covenant in the

contract that the respondent would not sale or deliver the PFA to any stranger. There was no express covenant not to deliver the PFA to a third party. As there was no negative covenant, there was no question of enforcement of such negative covenant under Section 42 of the Specific Relief Act. He further submitted that in any event as the petitioner itself had failed to perform its part of the contract and failed to lift the PFA, which was offered, the case was clearly covered by the proviso to section 42 of the Specific Relief Act, and therefore, the petitioner was not entitled to a negative injunction also.

10. In the alternatively, Mr. Aney, the learned senior counsel for respondent, submitted that if at all Court was inclined to grant an injunction for enforcement of the implied negative covenant, it should be subject to certain conditions, as suggested by him. He firstly submitted that the PFA is not a marketable commodity at all; it is an industrial waste. This industrial waste is unfriendly for the environment and is required

to be handled in accordance with the provisions of Environmental Protection Act, the Environmental Protection Rules, as also the various notifications, issued under the said Act or the Rules. He further submitted that under a notification dated 14th September 1999 respondent was required to give 10% of the PFA free of costs to the brick manufacturers, without any payment of consideration and was required to handle the said coal ash in the manner specified in the notification. He submitted that the petitioner was not collecting the entire PFA generated and if the same was not disposed of forthwith, it was likely to accumulate on the site 3000 M. T. of PFA was generated every day and such a large quantity of it accumulated on site, it was likely to escape in the air, polluting the atmosphere and the respondent could face the danger of being required to close down its power plant altogether. He further submitted that generation of electricity was the main purpose and function of the respondent and the PFA was an industrial waste in the process of manufacture, and was given free to the

petitioner, so as to relieve the respondent of the responsibility of handling it. If the petitioner fails to lift the PFA forthwith on its generation, the respondent has to take immediate steps for its removal, so as to prevent atmospheric pollution. He therefore, submitted that strict conditions should be imposed, if at all an injunction is granted, for forthwith removal of the PFA failing which respondent may be permitted to sale or other wise dispose of the PFA in the manner it deems.

11. On perusal of the affidavit dated 8th March 2007 of Mr. Georg Dirk, the Chairman and Managing Director of the petitioner, it is clear that the PFA generated in the respondent's power plant is not a scarce commodity at all. PFA is generated and is available at Dahanu Power Station of Reliance, Energy Trombay Power Station of Tatas, and also at Bhusawal Power station, Kapakeda Power Station Paras Power station and Parali Power Station owned by the respondent. Assuming that the PFA generated in the power stations of Reliance and Tata are not available for sale.

the PFA generated in 4 power station of the respondent at Bhusawal, Kapakeda, Paras and Parali, is available or could be available in the market. The PFA, thus appears to be an ordinary article of commerce, which is available in the market. The PFA at the Nashik Thermal Power Station of the respondent is not of any special value, nor is it shown to be different than the PFA available in any other Thermal Power Plants. The product also appears negligibly priced. The PFA generated at the suit power plant is offered to the respondent free of costs. Assuming that the consideration Rs. 30/- per M.T. of Prozzocrete produced out of the PFA represents value of the PFA, still its value would be less than 3 paise per Kg. Not being an extra ordinary article of commerce, nor of an article special value or interest to the petitioner, prima facie, the contract for sale of the PFA being a movable property, cannot be specifically enforced in view of section 10 of the Specific Relief Act. In my view, therefore, the petitioner is not entitled to the relief of mandatory injunction for sale / delivery of the PFA in this petition

under section 9 of the Arbitration Act.

12. As regardes the claim of injunction restraining the respondent for selling / delivering the PFA to a third party , the contention of the respondent that the contract contains no negative covenant that the respondent shall not supply the PFA to anybody else, is not meritorious. Clause 3.3 of the agreement dated 4th October 2000 reads thus -

> "DIPL does hereby agree to off take a minimum quantity of 1000 MT/day of PFA up to a maximum period of 12 months from the commissioning date. DIPL shall thereafter, and if any within a period of 48 Months from the Effective Date off take a minimum quantity of 3000 MT/day of PFA during the entire remaining term of this Agreement. Provided that MSEB shall, in its sole discretion, be entitled to dispose of or deal with the PFA generated at the NTPS over and above the quantities as stated above, in such manner as it may

deem fit or proper and that MSEB shall not be liable to DIPL if it is unable to supply 1000MT/ day or 3000 MT / day of PFA as aforesaid or any PFA at all as aforesaid by DIPL due to the circumstances beyond the control of MSEB."

13. In Clause 3.3 the petitioner had agreed to off take a minimum of 1000 MT/day of PFA during the first period of 12 months and 3000 MT/ day during the remaining 29 years of the agreement. There is a corresponding obligation on the respondent to supply 1000/ 3000 MT/day of PFA to the petitioner. The second part of Clause 3.3 provides that the respondent would have a discretion to sale PFA to outsiders, only over and above the contracted quantity of of 1000 or 3000 MT/day. In other words, there is an implied prohibition - not to sale of the PFA to anybody, unless 1000 / 3000 MT/day of PFA was supplied to the petitioner.

14. Section 42 reads thus :-

> **Injunction to perform negative agreement :-** Notwithstanding anything contained in clause (e) of section 41, where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, the circumstances that the Court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement:
>
> . Provided that the plaintiff has not failed to perform the contract so far as is binding on him.

. It specifically refers to the negative agreement being express or implied, meaning thereby that the negative covenant / agreement that the respondent would not do something, can even be implied. Clause 3.3 of the agreement

dated 4th October 2000 in my view contains an implied prohibition that the respondent would not sell the PFA to a third party, untill its obligation to supply 1000 to 3000 MT/day of PFA to the petitioner was fulfilled.

15. As I have stated earlier that on the basis of material produced on record, it is not possible to conclude at this stage that petitioner had committed any breach of the agreement dated 4th October 2000 or that it had failed to perform its part of the contract. In the circumstances, the petitioner is entitled to enforce the negative covenant, as has been held in the various decisions, referred to and relied upon by Mr. Dada, In **Sky Petroleum Vs. VIP Petroleum Ltd (Supra),** a Chancery Judge held that though the Courts would refuse the specific performance of Contract to sale and purchase chattels, it can grant an injunction restraining the defendant from selling the said chattels to others. I can do no better than to quote a paragraph from the said decision, which reads thus-

"Now I come to the most serious hurdle in the way of the plaintiff company which is the well-known doctrine that the court refuses specific performance of a contract to sell and purchase chattels not specific or ascertained. That is a well established and salutary rule and I am entirely unconvinced by counsel for plaintiff company when he tells me that an injunction in the form sought by him would not be specific enforcement at all. The matter is one of substance and not of form and it is, in any judgment, quite plain that I am for the time being specifically enforcing the contract if I grant an injunction. However, the ratio behind the rule is, as I believe, that under the ordinary contract for the sale of non specific goods, damages are a sufficient remedy. That, to my mind, is lacking in the circumstances of the present case. The evidence suggests and indeed it is common knowledge, that

> the petroleum market is in an unusual state in which a would-be buyer cannot go out into the market and contract with another seller, possibly at some sacrifice as to price. Here, the defendant company appears for practical purposes to be the plaintiff company's sole means of keeping its business going, and I am prepared so far to depart from the general rule as to try to preserve the position under the contract until a later date. I, therefore propose to grant an injunction."

16. Section 42 of the Specific Relief Act came up for consideration before the Apex Court in **Gujrat Bottling Co. Ltd. Vs. Coca Cola Co. (Supra).** In that case the appellant Gujrat Bottling Co. Ltd., had entered into a bottling contract with the respondent Coca Cola Co. The control of the appellant was acquired by Pepsi Company, directly competing with Coca Cola Company. On such acquisition of control, the appellant purported to terminate the

bottling contract with the respondent. In the respondent's suit for specific performance, the question arose whether any injunction could be granted, though not for specific performance of contract, for restraining the appellant from abiding by the negative covenant in the agreement that it would not bottle for others. In that context in paragraph 42 of the decision, the Supreme Court observed as follows-

> "In the matter of grant of injunction, the practice in England is that where a contract is negative in nature, or contains an express negative stipulation, breach of it may be restrained by injunction and injunction is normally granted as a matter of course, even though the remedy is equitable and thus in principle a discretionary one and a defendant cannot resist an injunction simply on the ground that observance of the contract is burdensome to him and its breach would cause little or no

prejudice to the plaintiff and that breach of an express negative stipulation can be restrained even though the plaintiff cannot show that the breach will cause him any loss [See: **Chitty on Contracts,** 27th Edn., Vol. I, General Principles, paragraph 27-40 at p.1310; Halsbary's Laws of England, 4th Edn., Vol. 24, prescribes that notwithstanding anything contained in Clause (e) of Section 41, where a **contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, the circumstance that the court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement.** This is subject to the proviso that the plaintiff has not failed to perform the contract so far as it is binding on him. The Court is, however, not bound to grant an injunction in every case

and an injunction to enforce a negative covenant would be refused if it would indirectly compel the employee either to idleness or to serve the employer.

[See : **Ehrman V. Bartholomew, N. S. Golokari at p.389.]"**

17. The decision cited above fortifies my view that an injunction can be granted to the respondent, restraining it from selling or giving the PFA to an outsider, in view of an implied negative covenant in the agreement that the respondent shall not supply the PFA unless the PFA of 1000 / 3000 MT/day was supplied to petitioner.

18. While granting an injunction, the allegation of the respondent that the petitioner has not been lifting the entire quantity of PFA generated and is not likely to lift the entire quantity of PFA generated thereby putting the respondent at risk of polluting the environment needs to be addressed to. Under the agreement that the petitioner was agreed to put up 4 Hoppers (Silos) for

collection of the PFA. The total extent of PFA which is to be collected by the petitioner is 3000 MT/day. It is a matter of common knowledge that a businessman would not construct a plant or an utility in the plant, which is not needed, nor would he spend money for unnecessary and unwarranted utilities. One can reasonably expect that 4 Hoppers were needed for collection of 3000 MT/day of PFA as when the petitioner agreed to construct the hoppers. Assuming that there may be some extra capacity, capacity of one Hopper may not ordinarily exceed collection of 1000 MT/day. Learned counsel for the respondent submitted that prima-facie it must be held that petitioner would not be able to collect 3000 MT/day of PFA from one hopper only. He further submitted that leaving aside the dispute as to who was to construct a conveyor system for transportation of the PFA from the power plant of the respondent to the hoppers, the fact remains that conveyor system has not been erected. He submitted that distance between the site of the power plant and the Hopper was about 500 meters. It was not possible to

physically carry 3000 MT/day (300 truck loads) of PFA manually from the power plant, to the site of Hopper, and therefore ex-facie it would not be possible for the petitioner to lift 3000 MT/day of PFA. Learned counsel for the respondent also invited my attention to the table given at page 199 of the affidavit regarding lifting of the PFA, by the petitioner after the ad interim order was passed by this Court on 22nd December 2006. He further submitted that the table showed that the quantity of PFA lifted by the petitioner even after the ad-interim order of the Court never exceeded 1000 MT/day. This was eloquent to show that the petitioner was unable to lift more than 1000 MT/day of the PFA. Learned counsel for respondent further submitted that if an absolute injunction was granted restraining the respondent from delivering the PFA to anybody else, a situation would be created wherein out of 3000 MT/day the PFA generated only almostt 1000 MT/day would be lifted by the petitioner and the remaining 2000 MT/day may get accumulated any part to which escaping in the air, would create environmental

pollution. He, therefore, submitted that in the event the petitioner failed to lift the PFA on daily basis, the respondent must be permitted to sell or dispose it of to outsiders. Submission in my view, is meritorious. Court cannot and should not pass any order, which would create an environmental hazard. If an absolute injunction is granted and the petitioner does not lift the PFA, situation would arise wherein the working of the power plant of the respondent may be banned for polluting the environment. This cannot be done and allowed by issuing an unconditional injunction. For these reasons, I pass the following order.

_O_R_D_E_R_

I) The respondent is restrained from selling / delivering to the strangers, or otherwise dispose of the PFA, without first offering to the petitioner, to the extent of 3000 MT/day.

II) In the event, petitioner fails to

remove the PFA offered to the extent of 3000 MT/day within a period 24 hours, the respondent would be free to sell/ deliver or otherwise dispose of the PFA not so collected to third parties.

III) The respondent shall not dispossesses the petitioner of the plant and machinery, nor remove the petitioner's machinery, nor disconnect the water or electricity, unless the charges thereof are not paid.

. Petition is accordingly disposed off .

. After this order was dictated in the open Court, the learned counsel for the respondent prays for the stay of the operation of the order. Operation of this order is stayed for a period of four weeks, subject to the condition that in the mean while the respondent shall comply with the ad interim order, which is in force till today.

[D. G. KARNIK, J.]